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December 12, 2017

Chairman Ajit Pai
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Dear Chairman Pai:

I request that you delay a vote on the Draft "Restoring Internet Freedom" Order (Draft Order), WC Docket No. 17-108, on the December Open Meeting Agenda of the Federal Communications Commission (FCC). Despite your insistence that the Federal Trade Commission (FTC) has the ability and authority to enforce net neutrality violations, both its ability and authority are limited.

I serve as Ranking Member of the Digital Commerce and Consumer Protection Subcommittee of the House Energy and Commerce Committee, which oversees the FTC. I am well aware of its strengths and weaknesses. While I am a strong supporter of the FTC's work on competition and consumer protection, given the limitations of the Commission, the open Internet may not be fully protected.

Unlike the FCC, which is able to create rules of the road for broadband providers, the FTC's hands are tied when it comes to rulemaking. Therefore, the FTC's oversight would be limited to bringing actions against broadband providers *after* they have committed unfair methods of competition or unfair or deceptive acts. Even when it can bring enforcement actions, the FTC cannot impose fines against broadband providers that engage in discriminatory conduct upon their first violation. The FTC is limited to entering cease-and-desist orders. Only violations of those orders result in fines. As we have seen repeatedly, the threat of real consequences – such as strong financial penalties – is the only effective deterrent.

Moreover, the FTC currently lacks the technical expertise for network management. Unlike the FCC, the FTC does not have engineers on staff. It could take years for the Commission to investigate a complaint and obtain an order for, say, discriminating against a rival company. In the meantime, competition will suffer and consumers will lose out.

Even beyond those regulatory and enforcement limitations, it is not even clear if the FTC has any authority over most broadband providers. AT&T Mobility's challenge to the FTC's jurisdiction over non-common carrier activities of telecommunications carriers in *FTC v. AT&T Mobility* is pending *en banc* review in the Ninth Circuit Court of Appeals. Last year, a three-judge panel of the Court held that, under the common carrier exemption, the FTC has no enforcement authority over any entity that is classified as a common carrier.

Most broadband providers are also traditional common carriers. If the Ninth Circuit again finds in favor of AT&T – regardless of what the Draft Order says or whether it is adopted – most broadband providers will still be exempt from the authority of the FTC under the Federal Trade Commission Act’s common carrier exemption. Instead of simply shifting oversight and enforcement from the FCC to the FTC as you suggest, the Draft Order could thrust broadband providers into a regulatory blackhole – not subject to any federal oversight at all and leaving consumers unprotected. In fact, the FCC made this exact point in its amicus curiae brief in support of the FTC, asserting:

If the *en banc* Court were to adopt AT&T’s position that the FTC Act’s common-carrier exception is “status-based” rather than “activity-based,” contrary to the reasoned analysis of the district court below, the fact that AT&T provides traditional common-carrier voice telephone service could potentially immunize the company from any FTC oversight of its noncommon-carrier offerings, even when the FCC lacks authority over those offerings—creating a potentially substantial regulatory gap where neither the FTC nor the FCC has regulatory authority.¹

Rushing forward with your Draft Order at this time, without considering the relevant facts, is not prudent decision-making. If the so-called “Restoring Internet Freedom” item is passed, the ability to protect the open Internet will be severely diminished if not eliminated altogether.

For these reasons, I fear the Draft Order fails to appreciate the ramifications of the FCC abdicating its role as the expert federal agency overseeing telecommunications. At a minimum, the FCC must conduct a more searching review of its competencies and that of the FTC. As you have noted, a process of hearings and thorough study is necessary to ensure the Commission has a robust record on which to base its decision.² I strongly oppose this item in its entirety. But at best, this issue is not yet ripe for consideration until *FTC v. AT&T Mobility* is finally resolved.

Sincerely,



Jan Schakowsky
Ranking Member
Subcommittee on Digital Commerce
and Consumer Protection

¹ Brief of the Federal Communications Commission as Amicus Curiae in Support of Plaintiff-Appellee, *FTC v. AT&T Mobility, LLC*, No. 15-16585 (9th Cir. May 30, 2017).

² Federal Communications Commission, Protecting and Promoting the Open Internet, Notice of Proposed Rulemaking, GN Docket No. 14-28, FCC 14-61, Statement of Commissioner Ajit V. Pai at 96-97 (rel. May 15, 2014).